

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE  
3

4 UNITED STATES OF AMERICA, )  
5 ) CR 10-310-RAJ  
6 Plaintiff, ) SEATTLE, WASHINGTON  
7 )  
8 v. ) August 2, 2011  
9 )  
10 FREDERICK DARREN BERG, ) Change of Plea  
11 ) Hearing  
12 Defendant. )

13  
14 VERBATIM REPORT OF PROCEEDINGS  
15 BEFORE THE HONORABLE RICARDO S. MARTINEZ  
16 UNITED STATES DISTRICT JUDGE  
17

18 APPEARANCES:  
19  
20

21 For the Plaintiff: Norman Barbosa  
22 Assistant United States Attorney  
23 700 Stewart Street  
24 Suite 5220  
25 Seattle, WA 98101

21 For the Defendant: Russell M. Aoki  
22 720 Olive Way, Suite 1522  
23 Seattle, WA 98101  
24 and  
25 Michael C. Nance  
615 2nd Avenue, Suite 760  
Penthouse Suite  
Seattle, WA 98104

1 THE CLERK: This is the matter of the United States  
2 versus Frederick Darren Berg, case No. CR 10-310 assigned to  
3 Judge Richard Jones. Will counsel please make their  
4 appearances for the record?

5 MR. BARBOSA: Norman Barbosa on behalf of the United  
6 States.

7 THE COURT: Mr. Barbosa. Thank you.

8 MR. NANCE: Good afternoon, Your Honor, Michael Nance  
9 and Russell Aoki for Frederick Darren Berg.

10 MR. AOKI: Good afternoon, Your Honor.

11 THE COURT: Mr. Aoki, Mr. Nance. Thank you.

12 Mr. Berg, good afternoon.

13 THE DEFENDANT: Good afternoon, sir.

14 THE COURT: Mr. Berg, you and I don't know each  
15 other. I am one of the district judges of the court. I have  
16 had a chance to review a draft copy of a proposed plea  
17 agreement. My understanding is that you have decided, after  
18 consultation with your counsel and discussions with the  
19 government, to go ahead and waive certain rights and enter  
20 pleas of guilty to certain federal felony offenses. Am I  
21 correct?

22 THE DEFENDANT: That's correct.

23 THE COURT: I am assuming that you reviewed this  
24 carefully with your counsel?

25 THE DEFENDANT: Yes, I have.

1           THE COURT: Now, you don't know this, you have no way  
2 of knowing this, but Mr. Nance and Mr. Aoki have practiced in  
3 front of me for years. They are two of the most competent  
4 criminal defense attorneys that I know. However, they cannot  
5 decide for you whether you wish to enter pleas of guilty.  
6 That is a decision that only you can make.

7           THE DEFENDANT: I understand.

8           THE COURT: They're here only to give you advice, to  
9 make a recommendation. Ultimately it's got to be your  
10 choice. Is this your choice?

11          THE DEFENDANT: It is.

12          THE COURT: All right. Let me tell you how we will  
13 proceed, what my job is, and what I need from you.

14          We need to make a full and complete record of all of this.  
15 I will go through the plea agreement in its entirety just to  
16 make sure you understand every portion of it and are able to  
17 answer any questions that you have about any of it as we go  
18 through it. If at any point in time you have any question  
19 for either your counsel, government counsel, or myself,  
20 please don't hesitate to ask. All right?

21          We do this, as I said, on the record. And we also do this  
22 under oath, which means we will swear you in, your responses  
23 to the court's questions will be sworn responses. And that  
24 means that if you were to materially misrepresent something,  
25 or perhaps even make false statements or perjure yourself,

1 that those statements could be used in the future by the  
2 government for further prosecution of either perjury or  
3 making a false statement. Do you understand?

4 THE DEFENDANT: I do, Your Honor.

5 THE COURT: All right. And I know it may seem  
6 redundant, but as I indicated, you and I have not seen each  
7 other, we don't know each other, and my job is to make sure  
8 that you understand fully and completely what you're charged  
9 with, what you're pleading to, the rights you give up by  
10 pleading guilty, and most importantly, the consequences of  
11 the plea of guilty. Then it's up to you to make that  
12 ultimate determination. All right?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: All right. Let me have you stand, raise  
15 your right hand, pay attention to the oath.

16 FREDERICK DARREN BERG

17 Having been sworn under oath, testified as follows:

18 EXAMINATION

19 BY THE COURT:

20 Q Let me ask only background questions about you. Is  
21 Frederick Darren Berg your true and correct name?

22 A Yes.

23 Q Tell me what your date of birth is.

24 A May 17, 1962.

25 Q In terms of education, how far did you get in school?

1 A Two years in college.

2 Q I assume you can read and write in English?

3 A Yes.

4 Q Have you had a chance to read this agreement for yourself?

5 A Yes.

6 Q Have you gone over it carefully with your counsel?

7 A Yes.

8 Q Do you feel you understand everything that it contains?

9 A Yes.

10 Q Have you ever been treated for any type of mental illness  
11 or addiction to narcotic drugs?

12 A No.

13 Q Are you currently taking any type of drug, any medication,  
14 any prescribed medicine, any alcohol, anything that would in  
15 any way impact your ability to follow along and understand  
16 what's in the plea agreement and our discussion right now?

17 A No.

18 Q All right. You have a copy of the plea agreement in front  
19 of you?

20 A I do.

21 Q As I indicated, I need to go over it carefully. So if you  
22 would look at page 1, paragraph 1. Under that section it  
23 talks about the charges, says: Defendant, having been  
24 advised of the right to have this matter tried before a jury,  
25 agrees to waive that right and enter a plea of guilty to the

1 following charges contained in the superseding indictment;  
2 (a) wire fraud as charged in Count 9, that's a violation of  
3 Title 18 United States Code Section 1343; (b) money  
4 laundering as charged in Count 11 of that indictment, again,  
5 Title 18 Section 1957; and finally (c) bankruptcy fraud,  
6 asset concealment as charged in Count 12, again, violation of  
7 Title 18 Section 152(1) of the United States Code. You  
8 understand, first of all, that those are the counts you are  
9 pleading guilty to?

10 A Yes.

11 Q I'm assuming that the remaining counts in the indictment,  
12 or it's your understanding the remaining counts in the  
13 indictment will be dismissed at the time of sentencing?

14 A That's my understanding.

15 Q Take a look at paragraph 2. Every criminal offense is  
16 made up of certain elements. Those are the things the  
17 government bears the burden of proving beyond any reasonable  
18 doubt to a jury of your peers in order for them to be able to  
19 get a conviction for the charge that they bring. These are  
20 the elements for these offenses.

21 For wire fraud, first, the defendant made up a scheme  
22 or plan for obtaining money or property by making false  
23 promises or statements; secondly, the defendant knew the  
24 promises or statements were false; third, the promises or  
25 statements were material, that is, they would reasonably

1 influence a person to part with money or property; fourth,  
2 the defendant acted with the intent to defraud; and finally  
3 fifth, the defendant used or caused to be used the wires in  
4 interstate or foreign commerce to carry out or attempt to  
5 carry out an essential part of the scheme.

6 Now, the elements of money laundering. First, the  
7 defendant engages or attempts to engage in a monetary  
8 transaction; secondly, the monetary transaction involves  
9 criminally-derived property; third, the value of the  
10 criminally-derived property exceeds \$10,000; fourth, the  
11 property is derived from specified unlawful activity; fifth,  
12 the defendant knows that the property is criminally derived.

13 And finally the elements of bankruptcy fraud, asset  
14 concealment. First, a bankruptcy case was pending on or  
15 about July 27, 2010 in which the defendant was the debtor;  
16 second, that the property the defendant concealed as alleged  
17 in the superseding indictment was part of the bankruptcy  
18 estate of the debtor; third, the defendant concealed the  
19 property alleged in the superseding indictment from the  
20 trustee charged with the custody and control of that  
21 property; and finally fourth, that defendant acted knowingly  
22 and with the intent to defraud.

23 Those are the elements of these three separate felony  
24 offenses. Do you understand the elements?

25 A I do.

1 Q Do you have any questions at all about this entire  
2 paragraph?

3 A I don't.

4 Q Take a look at paragraph 3. It talks about the penalties.  
5 Now here we're talking about the statutory penalties for  
6 these offenses. This is what Congress has set out.

7 For Count 9, wire fraud, it can be imprisonment for up  
8 to 20 years, a fine of a quarter million dollars. The period  
9 of supervised release of up to three years. And there are  
10 mandatory special assessments of \$100 per felony offense.

11 For Count 11, money laundering, up to ten years of  
12 imprisonment. Again, quarter million-dollar fine, three  
13 years of supervised release, and statutory special assessment  
14 of \$100.

15 And finally for Count 12, the bankruptcy fraud,  
16 imprisonment for up to five years, quarter million-dollar  
17 fine, three years supervised release, and \$100 special  
18 assessment.

19 It says you understand and agree that the special  
20 assessment shall be paid at or before the time of sentencing.  
21 You also understand that the supervised release is a period  
22 of time following imprisonment during which you would be  
23 subject to certain restrictions and requirements as set out  
24 by the trial court, by the sentencing court. It says you  
25 further understand that if that is imposed and you violate



1 one or more of those conditions, and the court finds you in  
2 violation, you could be returned to prison for all or part of  
3 the term of supervised release that was originally imposed.  
4 And that could result in you serving a total term of  
5 imprisonment greater than the statutory maximum.

6 It says you understand, in addition to any term of  
7 imprisonment and/or fine, the court may order you to pay  
8 restitution to any victims. You also understand that as a  
9 consequence of pleading guilty, that may include the  
10 forfeiture of property, specified property as a part of the  
11 sentence as imposed by the court, or as a result of another  
12 civil judicial or administrative process.

13 It says you agree that any monetary penalties that are  
14 imposed are due and payable immediately. You agree to submit  
15 a completed financial statement-of-debtor form if that's  
16 requested by the U.S. Attorney's Office.

17 Any questions about anything in paragraph 3, the  
18 statutory penalties?

19 A No questions.

20 Q Take a look at paragraph 4. Paragraph 4 contains the  
21 rights that are waived by pleading guilty. You are not  
22 unique. Every criminal defendant has the same exact rights.  
23 Every criminal defendant that enters a plea of guilty waives  
24 these very same exact rights. Let me go over them. I'll ask  
25 you if understand them. I'll ask you if you have any

1 questions about any of them.

2 By asking the court to accept your plea you are  
3 knowingly and voluntarily giving up: (A) The right to plead  
4 not guilty, to persist in that not guilty plea. (B) The  
5 right to a speedy and public trial before a jury of your  
6 peers. (C) The right to the effective assistance of counsel  
7 at that trial, including if you cannot afford counsel, the  
8 right to have the court appoint counsel for you. (D) You  
9 give up the right to be presumed innocent until guilt has  
10 been established beyond any reasonable doubt.

11 (E) The right to confront and cross examine witnesses  
12 that might be called against you at that trial. (F) The  
13 right to compel or subpoena witnesses to appear on your  
14 behalf at trial. (G) The right to testify yourself or to  
15 remain silent at trial. And if you did choose to remain  
16 silent, that silence could not be used against you. And  
17 finally: (H) The right to appeal a finding of guilt or any  
18 pre-trial rulings made by the court. Do you understand each  
19 of those rights?

20 A Yes.

21 Q Do you understand that by pleading guilty you waive each  
22 of those rights?

23 A Yes.

24 Q Take a look at paragraph 5. It talks about the U.S.  
25 Sentencing Guidelines. It says you understand and

1 acknowledge that at the time of sentencing the court must  
2 consider the guideline range as established by the United  
3 States Sentencing Commission, together with all the other  
4 factors set out in Title 18 Section 3553(a).

5 And that includes the nature and circumstances of the  
6 offense; the history and characteristics of the defendant --  
7 that's you -- the need for the sentence to reflect the  
8 seriousness of the offense, to promote respect for the law,  
9 and to provide just punishment for the offense; the need for  
10 the sentence to afford adequate deterrence to criminal  
11 conduct; the need for the sentence to protect the public from  
12 further crimes of the defendant; the need to provide the  
13 defendant with educational and vocational training and  
14 medical care, or other correctional treatment in the most  
15 effective manner; the kinds of sentences available; the need  
16 to provide any restitution to victims; and, finally, the need  
17 to avoid any unwarranted sentence disparity amongst  
18 defendants involved in similar conduct with similar records.

19 It says you also acknowledge and understand the court  
20 will determine your applicable guideline range at the time of  
21 sentence; and, except as provided in paragraph 8 below, that  
22 you may not withdraw a guilty plea solely because of the  
23 sentence imposed by the court.

24 Now, I want to make sure you understand the way this  
25 works. This plea is specifically under 11(c)(1)(C). To us

1 that means something very specific. And I know that your  
2 attorneys have explained what that means to you. And that is  
3 that even though the court must consider all of these things,  
4 in this particular case the sentencing court, should it  
5 choose to accept the plea agreement, is being bound by that  
6 agreement has no choice. Because -- well, I take that back.  
7 The court has a choice, and the choice is not to accept it.  
8 If it's not accepted, then at that point you and the  
9 government are free to withdraw from the plea agreement  
10 entirely, go back to square zero. Do you understand?

11 A I do.

12 Q Look at paragraph 6 page 5, it talks about restitution.  
13 It says you shall make restitution in an amount to be  
14 determined by the court at the time of sentencing. And,  
15 again, as we decided earlier, that amount is to be due and  
16 payable immediately. But obviously, depending upon how much  
17 it is, may be paid in accordance with a schedule of payments  
18 as proposed by U.S. Probation. Any questions about paragraph  
19 6?

20 A No, Your Honor.

21 Q Take a look at paragraph 7. This is the parties'  
22 statement of facts. It says, the parties agree to the  
23 following facts, and it is these facts that make you guilty  
24 of the charged offenses. What I'm going to do is read the  
25 statement of facts and ask if you accept those facts. If you

1 have any questions about any of this at the end, please ask,  
2 all right?

3 It says, "beginning at an exact time unknown, but  
4 sometime within the last ten years, and continuing until in  
5 or around August 2010, at Seattle and elsewhere, within the  
6 Western District of Washington, Frederick Darren Berg did  
7 knowingly and willfully devise and execute a scheme and  
8 artifice to defraud, and for obtaining money and property by  
9 means of material false and fraudulent pretenses,  
10 representations, and promises; and in executing or attempting  
11 to execute this scheme and artifice, did knowingly cause to  
12 be transmitted in interstate commerce by means of wire  
13 communication, certain signs, signals and sounds. The object  
14 of the scheme and artifice to defraud was to defraud  
15 investors by falsely representing that Frederick Darren Berg  
16 was using all investor funds to purchase seller-financed real  
17 estate contracts, real estate, and mortgage-backed  
18 securities, and also to make hard-money loans. In fact, as  
19 he then well knew, during the course of the scheme and  
20 artifice to defraud, Frederick Darren Berg stole millions of  
21 dollars in investor funds which he used for his own benefit  
22 and to pay off the loans of earlier investors in order to  
23 conceal his false statements and continue his scheme to  
24 defraud.

25 Between January 2001 and August 2010 Berg created and

1 operated a series of investment funds purportedly for the  
2 sole purpose of investing and selling financed real estate  
3 contracts, hard-money loans, real estate and mortgage backed  
4 securities. Berg exercised exclusive control over the  
5 operation of each of the investment funds and was the only  
6 person with access to the funds' bank records. Berg was the  
7 sole signatory of the funds' bank accounts and the only  
8 person with access to all of the funds' accounting records,  
9 including records related to the funds' investors, the funds'  
10 assets, and the funds' expenses.

11 Berg caused others to promote the investment funds and  
12 raise money from investors based on statements he made  
13 regarding the purpose of the funds, how the funds would  
14 operate, the types of assets the funds would purchase and  
15 hold, and for what purpose the investors' money would be  
16 used.

17 It was part of the scheme or artifice to defraud that  
18 Berg falsely represented the Meridian Mortgage Investment  
19 Funds would use investor money solely to purchase  
20 seller-financed real estate contracts, fund short-term loans,  
21 purchase real estate and pay management and servicing fees to  
22 Frederick M. Berg and its related companies.

23 In the truth, and in fact, as he then well knew, Berg  
24 used investors' money for his other business interests,  
25 including the creation and operation of a bus company named

1 MTR Western and several subsidiaries as well as his personal  
2 expenses.

3 Berg raised over \$280 million from approximately 500  
4 investors in his investment funds. As a result of Berg's  
5 scheme and artifice to defraud, the victims lost  
6 approximately \$100 million that he used for his personal  
7 benefit and to promote the scheme to defraud.

8 On or about May 10, 2007, within the Western District  
9 of Washington, Berg did knowingly engage in a monetary  
10 transaction in criminally-derived property of a value greater  
11 than \$10,000 and derived from specified unlawful activities,  
12 namely wire fraud, to wit: A transfer of \$1,000,000 from the  
13 Commerce Bank account ending in 2804 of Meridian Partnership  
14 Management, Incorporated, to the Commerce Bank account ending  
15 in 9601 belonging to Frederick Darren Berg.

16 On or about May 27, 2010, for the purpose of executing  
17 the scheme and artifice to defraud and obtain money by means  
18 of false and fraudulent pretenses, Berg did knowingly and  
19 intentionally cause to be transmitted in interstate commerce  
20 by means of a wire communication, a wire transfer of \$495,000  
21 from the Wells Fargo account of C.B., which represented an  
22 investment by C.B. in Meridian Mortgage Investment Fund II,  
23 to the Commerce Bank account of MPM Investor Services  
24 (FBO MMIDII). This wire traveled in interstate commerce via  
25 the FedWire system in New Jersey to the Western District of

1 Washington.

2 On July 27, 2010, Berg filed a personal bankruptcy  
3 petition in the matter of In Re: Frederick Darren Berg, Case  
4 No. 10-18668. This matter was pending through December of  
5 2010. As part of his bankruptcy proceedings, Berg concealed  
6 from the bankruptcy court and the Chapter 11 bankruptcy  
7 trustee his interest in proceeds from the sale of real  
8 property; his ownership of a brokerage account in the name of  
9 DB517LLC at TD Ameritrade; and his interest in a limited  
10 liability company in the name of DB517LLC. These assets were  
11 all part of the bankruptcy estate. Berg concealed these  
12 assets by failing to disclose these assets on his bankruptcy  
13 schedules and making false statements to the Chapter 11  
14 bankruptcy trustee about the nature and source of these  
15 assets when questioned specifically about these assets. Berg  
16 falsely claimed to the bankruptcy trustee that a portion of  
17 the funds identified above constituted post-petition earnings  
18 from consulting contracts he entered after he filed  
19 bankruptcy. In truth and in fact, as he then well knew, this  
20 money was the proceeds of a sale of real property that Berg  
21 completed on July 29, 2010.

22 I've basically read the entire statement of facts.  
23 Number one, do you agree with those facts?

24 A I do.

25 Q Is that, in effect, what happened?



1 A Yes.

2 Q You understand that those facts, then, fulfill the  
3 elements of the offenses, the three different felonies that  
4 we discussed?

5 A I do understand that.

6 Q Take a look at paragraph 8 that deals with sentencing.  
7 This particular plea deals with a section of the sentencing  
8 statute 11(c)(1)(C) of the Federal Rules of Criminal  
9 Procedure. It says, "The parties acknowledge and agree that  
10 the appropriate sentence of imprisonment to be imposed by the  
11 court is a term of 216 months and three years of supervised  
12 release. If the sentencing court rejects the agreement of  
13 the parties with regard to the appropriate sentence, both the  
14 defendant and the United States reserve the right to withdraw  
15 from this agreement pursuant to Rule 11(c)(1)(C) of the  
16 Federal Rules of Criminal Procedure and to proceed to trial.  
17 No other agreement has been made with regard to the  
18 imposition of the sentence in this matter, and the parties  
19 understand that the court retains full discretion with regard  
20 to the imposition of a term of supervised release, the  
21 conditions of supervised release, fines, forfeiture or  
22 restitution as may be applicable.

23 THE COURT: Mr. Nance and Mr. Aoki, let me ask a  
24 question here. It says on the top of page 8, that first part  
25 of that sentence, that the agreement is 216 months and three

1 years of supervised release. But then it says in the last  
2 sentence that no other agreement has been made and the  
3 parties understand the court retains full discretion with  
4 regard to the imposition of a term of supervised release. So  
5 what exactly does that mean to the parties?

6 MR. BARBOSA: Your Honor, I noticed that also. And I  
7 think we should cure that by deleting the words, "A term of  
8 supervised release" in line 7. So that it will say, "Full  
9 discretion with regard to the imposition of the conditions of  
10 supervised release," if the defendant agrees.

11 THE DEFENDANT: Yes.

12 MR. NANCE: We agree.

13 MR. BARBOSA: We can all initial that.

14 THE COURT: All right. So delete line 7 after it  
15 says -- delete "imposition of"?

16 MR. BARBOSA: Just, "A term of supervised release."

17 THE COURT: Yes.

18 Q (By the Court) Mr. Berg, do you understand what we were  
19 doing?

20 A I do.

21 Q All right. There was a conflict between the language, at  
22 least an apparent conflict to the court, and I wanted to  
23 clarify that and also clarify what you understood. So I am  
24 actually crossing that out.

25 And the rest of it is fine. You agree with it, Mr.

1 Berg?

2 A I do.

3 Q Take a look at paragraph 9. It says, "As part of the plea  
4 agreement the United States agrees that it will not oppose  
5 the defendant's request for placement at a particular Bureau  
6 of Prisons facility. The U.S. further agrees it will not  
7 take a position regarding the defendant's participation in  
8 Bureau of Prison's Residential Drug Abuse Treatment Program."

9 What this is saying, basically, is that they will not  
10 oppose your request for placement in a particular facility.  
11 And they won't take any position regarding whether or not you  
12 qualify or you should be given the chance to participate in  
13 those treatment programs. The critical aspect is that they  
14 have no control over this. First of all, it will be up to  
15 the sentencing court to decide whether or not to make a  
16 specific recommendation for placement. Normally it's  
17 pro forma. As sentencing judges we are more than willing,  
18 unless there's some very specific reason not to, to go along  
19 with a request for a particular placement. But you  
20 understand that ultimately all of that is up to the Bureau of  
21 Prisons; they get to decide, all we can do is recommend?

22 A I do, Your Honor.

23 Q Take a look at paragraph 10, waiver of appeal. It says,  
24 "Defendant is aware that under 18 U.S.C. Section 3742 that  
25 gives the right to appeal the sentence to be imposed, and

1 other federal statutes give the defendant the right to appeal  
2 other aspects of the conviction. In consideration of the  
3 United States' agreement to a sentence below the advisory  
4 guideline range, defendant knowingly and voluntarily agrees  
5 to waive the following rights:

6 (a) The right conferred under that statute to appeal  
7 the sentence imposed by the court, including any restitution  
8 order imposed and any term of supervised release imposed;

9 (b) The right to appeal any aspect of defendant's  
10 conviction, including any pre-trial suppression matters or  
11 other pre-trial dispositions of motions and other issues;  
12 and.

13 (c) The right to bring any collateral attack against  
14 defendant's conviction or sentence, except as it may relate  
15 to the effectiveness of legal representation.

16 It concludes by saying that if defendant breaches the  
17 plea agreement at any time by appealing or collaterally  
18 attacking (except as to the effectiveness of legal  
19 representation) the conviction or sentence in any way, the  
20 United States may prosecute defendant for any counts that  
21 were either dismissed or not charged pursuant to this plea  
22 agreement.

23 Any questions about paragraph 10?

24 A No, Your Honor .

25 Q Take a look at paragraph 11. It says, "As part of this

1 agreement the U.S. Attorney's Office for the Western District  
2 of Washington -- agrees to move to dismiss the remaining  
3 counts in the superseding indictment." They also agree not  
4 to prosecute you for any other additional offense known to  
5 them as of the time of this agreement that are based upon  
6 evidence in its possession at this time, and that arises out  
7 of the conduct giving rise to this investigation.

8 Now you understand and recognize in the language that's  
9 here, that the government has agreed not to prosecute all of  
10 the criminal charges they believe the evidence establishes  
11 were, in fact, committed by you, solely because of the  
12 promises being made by you in this agreement. You're  
13 agreeing, however, that for purposes of preparing the  
14 presentence report, the U.S. Attorney's Office will provide  
15 U.S. Probation with evidence of all conduct committed by you.

16 You finally agree any charges to be dismissed before or  
17 at the time of sentencing, that those were substantially  
18 justified in light of the evidence available to the  
19 government. In other words, they were not vexatious,  
20 frivolous, or taken in bad faith, and their dismissal will  
21 not provide you with the basis for any future claims known  
22 under what is the "Hyde Amendment." Do you understand  
23 everything in that agreement?

24 A I do.

25 Q Paragraph 12 brings me full circle of where we started

1 this whole colloquy with you, that is the voluntariness of  
2 the plea. That is, only you can make the decision, not the  
3 government, not your attorneys, not anyone else. It says  
4 here, "The defendant has entered into this plea agreement  
5 freely and voluntarily and that no threats or promises, other  
6 than the promises contained in this plea agreement, were made  
7 to induce defendant to enter these pleas of guilty." Do you  
8 agree?

9 A I do.

10 Q Is this your choice?

11 A Yes, it is.

12 Q Take a look at 13, statute of limitations. It says that  
13 in the event this agreement is not accepted by the court, for  
14 whatever reason, or in the future you are in breach of the  
15 terms, then the statute of limitations, that timeframe the  
16 government has in which they must bring charges for any  
17 specific criminal conduct, will be deemed to have been  
18 tolled, that means stopped from running, from the date of the  
19 plea agreement to 30 days following the date of  
20 non-acceptance of that agreement by the court, or 30 days  
21 following the date in which a breach of the agreement by you  
22 is discovered by the U.S. Attorney's Office.

23 Any questions about the language of paragraph 13 or its  
24 meaning?

25 A No, Your Honor.

1 Q Take a look at 14. This refers to post-plea conduct. It  
2 says you understand the terms of this plea agreement apply  
3 only to conduct that occurred prior to the execution of this  
4 agreement. If, after the date of this agreement, defendant  
5 should engage in any type of illegal conduct, or conduct that  
6 is in violation of his conditions of release or custody, and  
7 examples of that could include but are not limited to  
8 obstructing justice in some way, failing to appear for court  
9 proceedings, other criminal conduct while awaiting sentence,  
10 making false statements to either law enforcement agents,  
11 pre-trial services officers, probation officers, or the  
12 court, then the government would be free, under this  
13 agreement, to ask that court to sentence you -- to seek a  
14 sentence that takes such conduct into consideration. Such a  
15 sentence could include, to the extent the guidelines are  
16 applicable, either a sentencing enhancement or upward  
17 departure.

18 Is that understood?

19 A That's confusing. But I don't know how -- if the  
20 government seeks that, does that invalidate the agreement?

21 THE COURT: That's a wonderful question, Mr. Barbosa,  
22 since this is an 11(c)(1)(C) plea. Let's say he somehow  
23 violates the terms as set out by this paragraph. Does that  
24 mean to you that you no longer are bound by the  
25 recommendation of a very specific timeframe here, 216 months?

1 MR. BARBOSA: Yes, I believe it does. I believe if  
2 he engages in additional criminal conduct or obstructive  
3 conduct, it invalidates our -- he's violated the plea  
4 agreement. He's violated this particular provision of it and  
5 we are no longer bound by that.

6 THE COURT: Mr. Nance, Mr. Aoki, do you agree?

7 MR. NANCE: Our position would be that if they could  
8 prove a breach -- we think this is pretty academic -- but in  
9 the event that they could, it would, in fact, negate the full  
10 agreement, we'd be back at square one. That's our position.  
11 In other words, the agreement would be -- they could argue  
12 he's breached it. And if he has, there is no agreement.

13 THE DEFENDANT: My concern is the language regarding  
14 conditions of custody. I'm currently held in the FDC, and I  
15 have very little control over some of these things that  
16 happen there. And I've been sent to the hole for not making  
17 my bed. I don't know whether that -- does that breach the  
18 agreement?

19 Q (By the Court) This is a pretty big disagreement, Mr.  
20 Berg, that we need to resolve right now one way or the other,  
21 and there's got to be a meeting of the minds of the two sides  
22 before we can go.

23 A It's certainly not worth -- I just wanted a clarification.

24 Q Take a look at page 3 of your plea agreement, paragraph 3.  
25 Remember when we went over the statutory penalties?



1 A Um-hum.

2 Q You're pleading guilty to three separate counts. The  
3 count with the highest statutory penalty is Count 9, wire  
4 fraud, and that could be imprisonment for up to 20 years.  
5 The court cannot impose a sentence greater than that. It  
6 would be an illegal sentence. It cannot give you anything  
7 more than 240 months. You are agreeing, in fact requesting,  
8 in fact binding the sentencing court to impose 216 months.  
9 So what we're talking about is a 24-month potential swing  
10 here. Do you understand?

11 A Um-hum.

12 Q So if you were to violate the plea agreement as set out in  
13 paragraph 14, the government is saying, well, we could ask  
14 for up to 240 months as a result of that violation. If he's  
15 done other stuff that violates and breaches the plea  
16 agreement, then we're not stuck to the 216, but they would be  
17 stuck to the 240. They can't go above that. Your attorneys  
18 are saying, no, we don't believe that, we don't agree with  
19 that, we think that if he violates in some future way, well  
20 then he's liable for any violations, whatever consequences  
21 that might be, but that obviates the entire plea agreement;  
22 we have no agreement at that point. Is that your  
23 understanding of the disagreement here?

24 A Yes.

25 Q All right.

1 THE COURT: Mr. Barbosa, which way do you want to go?

2 MR. BARBOSA: I stick to my original explanation.

3 Post-plea conduct is a standard term of our plea agreements.

4 One of the intentions there is if a defendant engages in

5 conduct that is in violation of various rules, including his

6 custody -- if he was on release, which he isn't, but a

7 typical example is an obstruction of justice, we would be

8 allowed to ask the court to take into account that activity.

9 I can't change my interpretation of that. That only gives me

10 the right to bring it up to the court. Bringing up an issue

11 to the court does not mean it actually carries any weight

12 with the court. Often issues of seeming irrelevance, such as

13 failing to make the bed, do not impress upon the court too

14 much. That's about the best I can say about that issue.

15 THE COURT: I agree with you, Mr. Barbosa, in that is

16 the normal mechanism, and this is very standard language that

17 is used, except for 11(c)(1)(C) pleas.

18 MR. BARBOSA: I took it out of our office's

19 11(c)(1)(C) plea agreement. So I do not have authority to

20 remove that provision.

21 MR. NANCE: I would just suggest, he certainly has

22 the right to bring it to the court's attention, but he's duty

23 bound to recommend the 18 years, unless he wants to withdraw

24 from the plea agreement.

25 THE COURT: Mr. Berg, I have a suggestion. Let me

1 see if your attorneys are willing to accept this because I  
2 think it's an important one. One, I like the fact that you  
3 spoke up saying it was confusing, because then it really  
4 assures me that you are tracking everything that we've been  
5 saying. And that's the primary, most important thing for me;  
6 but two, it is confusing and I think we need to hammer it  
7 out. How about this. This is an agreement between you and  
8 the government, just like any other portion of this where it  
9 says they will not oppose, they won't do this, right? They  
10 won't necessarily recommend, but they will not oppose, and  
11 they take no position on another one. What about if we agree  
12 to disagree? How about if we say the government believes the  
13 language here says this, what he just said. The defendant,  
14 however, does not agree with that. We'll leave it as an  
15 issue for the sentencing court to deal with if this  
16 hypothetical ever becomes a reality, and both sides have the  
17 ability to argue their respective positions to the sentencing  
18 judge, who can make a legal ruling. And if the ruling should  
19 go against you, you reserve your right to appeal that issue,  
20 and solely that issue. Gentlemen, how does that sound?

21 MR. BARBOSA: Frankly, Your Honor, I think that is  
22 the way any disagreement over the interpretation of the plea  
23 agreement would be handled, would then become subject to the  
24 rules of contract law and whether or not this is clear or  
25 not, which it might not be. I'm not conceding that at all.

1 But it's only an issue if one of these events even occurs.  
2 So I think you were correct, this would be an issue for later  
3 consideration by the assigned judge on the case.

4 MR. AOKI: Your Honor, if I can address this issue.  
5 Our concern is, and we worked very hard to hammer out this  
6 11(c)(1)(C) agreement, and we would like to be able to  
7 utilize the full strength of it by providing to the  
8 sentencing court the discretion of what gets added or  
9 doesn't. What is in breach or not breached, what gets  
10 potentially added to a sentence, I think circumvents our goal  
11 today. And I would propose that we agree to disagree, and  
12 the decision be made by another judge other than the  
13 sentencing court.

14 THE COURT: Would you be willing to agree to let this  
15 court make a decision if that should ever be an issue?

16 THE DEFENDANT: Yes.

17 MR. AOKI: That's fine, Your Honor.

18 THE COURT: Mr. Barbosa?

19 MR. BARBOSA: Is this a proposed addition to the plea  
20 agreement that we're discussing? Because I think if there's  
21 any -- this is getting a little bit confusing, because we're  
22 talking about agreements, and agreements to disagree.  
23 Whatever happens here has to be part of the plea agreement;  
24 according to Rule 11, there can't be any side agreements. So  
25 I am concerned about the potential for a future court seeing

1 this as the parties striking some side agreement. The terms  
2 of this plea agreement were negotiated very strenuously and I  
3 just don't know if we can put anything else here that would  
4 further clarify that.

5 MR. NANCE: Your Honor, if I could have just a moment  
6 with Mr. Barbosa.

7 THE COURT: Absolutely.

8 MR. BARBOSA: I think Mr. Nance has come up with a  
9 good solution to this. We will strike a portion of that  
10 paragraph on page 9, the last line on the page. Line 28  
11 says, "...this agreement, defendant should engage in illegal  
12 conduct," after that delete "or conduct that is in violation  
13 of his/her conditions of release or custody." And then keep  
14 the items in parentheses which essentially outline all  
15 illegal conduct. That way we have an agreement fully  
16 memorialized in the plea agreement. There are no side  
17 agreements. Whatever discussions that occurred on the record  
18 regarding interpretations of that are irrelevant, because the  
19 agreement is fully written down.

20 THE COURT: I like that better Mr. Barbosa. I think  
21 you're absolutely right about -- I was not ever intending to  
22 do any side agreements of any type; anything we would do  
23 would be memorialized as part of the agreement itself. I was  
24 trying to facilitate a mechanism for the parties to disagree.  
25 But if you're willing to strike the language following the

1 last comma in line 28, the language that will be stricken  
2 reads, "...or conduct that is in violation of his or her  
3 conditions of release or custody. Examples of which include  
4 but are not limited to," and then just leave the rest of it?

5 Then I think the last sentence now reads, "If, after the  
6 date of the agreement, defendant should engage in illegal  
7 conduct, obstruction of justice, failure to appear for court  
8 proceedings, criminal conduct while pending sentencing," et  
9 cetera, the rest of it is fine. Gentlemen, do agree with  
10 that as well?

11 MR. BARBOSA: We intended to keep the, "Examples of  
12 which include, but are not limited to."

13 THE COURT: Okay, I'm sorry. "Defendant should  
14 engage in illegal conduct, examples of which could include  
15 but are not limited to," then leave the rest of it. Is that  
16 fine?

17 MR. NANCE: That's fine.

18 THE COURT: Mr. Berg.

19 THE DEFENDANT: Yes.

20 THE COURT: The exact language that will be stricken  
21 is, "Or conduct that is in violation of his/her conditions of  
22 release or custody."

23 Q (By the Court) All right. Mr. Berg, paragraph 15 page 11  
24 says, "The United States and defendant acknowledge that these  
25 terms constitute the entire plea agreement between the

1 parties. This agreement binds only the U.S. Attorney's  
2 Office for the Western District of Washington. It does not  
3 bind any other U.S. Attorney's Office or any other office or  
4 agency of the United States, or any other state or local  
5 prosecutor." Do you agree with the language of paragraph 15?

6 A One moment.

7 (Defendant confers with his attorneys.)

8 A Yes.

9 Q You understand what that means, literally that this  
10 agreement is between you and this attorney, U.S. Attorney's  
11 Office here. If there's another U.S. Attorney's Office or  
12 any other prosecuting agency out there that feels they have  
13 sufficient evidence to proceed against you and the desire to  
14 do so, that will be up to them. Do you understand?

15 A On the same charges?

16 Q On the same basis, the same facts.

17 A Yes. I understand.

18 Q I'm looking at the signature page signed by Mr. Barbosa,  
19 Mr. Westinghouse, also another Assistant United States  
20 Attorney; Mr. Nance, Mr. Aoki; there's a signature in blue  
21 ink dated 8/2/11 above the printed line that says Frederick  
22 Darren Berg, did you sign and date this agreement?

23 A Yes, Your Honor, I did.

24 Q Are you acknowledging by that signature that you believe  
25 and you understand that this agreement, as changed in our

1 discussion, constitutes the plea agreement between you and  
2 the United States Government?

3 A Yes, Your Honor, I do.

4 Q Do you have any questions about it at all?

5 A No further questions.

6 Q All right. Then let me ask you the final question I have.  
7 And that's keeping in mind the consequences of your plea,  
8 keeping in mind the rights you give up by pleading guilty,  
9 how would you like to plead to wire fraud as charged in Count  
10 9; money laundering as charged in Count 11; and bankruptcy  
11 fraud asset concealment as charged in Count 12, all under  
12 violation of Title 18. Would you like to plead guilty or not  
13 guilty?

14 A Guilty, Your Honor.

15 THE COURT: Mr. Barbosa, is there any legal reason  
16 that you can think of, counsel, why the court should not  
17 accept the pleas of guilty?

18 MR. BARBOSA: No. Your Honor.

19 THE COURT: Mr. Nance, Mr. Aoki.

20 MR. NANCE: No, Your Honor.

21 MR. AOKI: No, Your Honor.

22 THE COURT: Gentlemen, I agree. Mr. Berg certainly  
23 is intelligent enough to understand what we've been  
24 discussing and reviewing this afternoon. He asked questions  
25 that were not only pertinent but very pointed about very



1 esoteric issues, conflicts in the proposed plea agreement  
2 before changed by the court. The court is satisfied that his  
3 plea of guilty is made knowingly, voluntarily and most  
4 importantly that it is willingly done. The court finds there  
5 is a sufficient factual basis that satisfies the elements of  
6 the three counts that he is entering pleas of guilty to.

7 The court will accept his pleas of guilty to wire fraud as  
8 charged in Count 9; money laundering as charged in Count 11;  
9 and bankruptcy fraud asset concealment as charged in Count  
10 12.

11 Madame clerk, do we have a sentencing date from Judge  
12 Jones' chambers?

13 THE CLERK: Yes, we do. Sentencing will be  
14 November 4th at 9:00 a.m. before Judge Jones.

15 THE COURT: Mr. Berg, let me tell you what will  
16 happen between now and then. In preparation -- the reason  
17 why it's set out at that time, not only is that the time  
18 given to us by Judge Jones' chambers, but the reason that  
19 that lengthy time is needed is because presentence reports  
20 are prepared for the court, one by the government, one by  
21 your counsel, and one by United States Probation. Probation  
22 is an independent branch. They're part of the court system.  
23 They will ask to interview you. That interview will be  
24 lengthy. It can certainly take place in the presence of your  
25 counsel, if you wish.

1       After they interview you, they will put it in written form  
2       and draft form, that will be given to counsel, both the  
3       government and to you, prior to the November 4th sentencing  
4       date. You and the government have the ability to make  
5       objections to that proposed presentence report prepared by  
6       probation. After those objections are made, the final report  
7       is prepared. Whether it's changed or not is up to the  
8       individual probation officer signing off on it. But it will  
9       be presented to Judge Jones, as well as the other presentence  
10      reports prepared by counsel. Judge Jones then takes all  
11      those presentence reports, reviews them, and that's how he  
12      gets to the sentence.

13      This is an 11(c)(1)(C), which means he doesn't have any  
14      choice in that number, the only choice he has is either to  
15      accept the plea agreement and go with it, or to reject it  
16      entirely, in which case both sides go to square one. Any  
17      questions at all?

18           THE DEFENDANT: No, Your Honor.

19           THE COURT: Mr. Barbosa, anything further that we  
20      need to do today?

21           MR. BARBOSA: No, Your Honor. Thank you very much.

22           THE COURT: Mr. Nance, Mr. Aoki, anything further at  
23      all?

24           MR. AOKI: No, Your Honor.

25           MR. NANCE: No, Your Honor.

1           THE COURT: Gentlemen, I know this wasn't easy. And  
2 Mr. Berg, I know this wasn't easy from your perspective as  
3 well. But as I said earlier, both of your attorneys are two  
4 of the best criminal defense lawyers I've ever seen practice  
5 in front of me. Mr. Nance still holds the record in my court  
6 for getting a not guilty plea on what was a slam dunk case  
7 for the prosecution. But that doesn't always happen. And  
8 there's an old adage in the law that says: The only bad plea  
9 is the one you walk away from. Hopefully this is a good  
10 result for you. Good luck, all right?

11           THE DEFENDANT: Thank you, Your Honor.

12           THE COURT: We'll be at recess, gentlemen.

13                   C E R T I F I C A T E  
14  
15

16           I certify that the foregoing is a correct transcript from  
17 the record of proceedings in the above-entitled matter.  
18  
19

20       /s/ Debbie Zurn

May 30, 2013

21       Debbie Zurn, Court Reporter

Dated